

PETITION NOT PRINTED

Office Supreme Court, U.S.

FILED

DEC 4 1960

JAMES R. BROWNING, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 143

WILLIE LEE STEWART,

Petitioner,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S BRIEF

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I

Opinion Below

The opinion of the Court of Appeals¹ is reported at 275 F.2d 617, 107 U.S. App. D.C. 159, and appears in the record at pages 380 *et seq.* There was no opinion by the District Court.²

¹ The United States Court of Appeals for the District of Columbia Circuit is referred to herein as the "Court of Appeals."

² The United States District Court for the District of Columbia is referred to herein as the "District Court."

II

Jurisdiction

Jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under the provisions of 28 U.S.C. Sec. 1254 (1).

Judgment of the Court of Appeals was entered in this cause on February 16, 1960 (R. 399). Petition for rehearing *in banc* was denied on March 30, 1960 (R. 400). Petition for writ of certiorari was filed in this Court on April 29, 1960. On June 13, 1960 this Court granted the petition for writ of certiorari and leave to proceed *in forma pauperis* (R. 400).

III

Statutes Involved

The statutes involved, to wit, 18 U.S.C. Sec. 3481, Title 22, Sections 2401 and 2901 of the District of Columbia Code, 1951 edition are set forth as Appendix I to this brief. Also involved is the Fifth Amendment to the Constitution.

IV

Questions Presented

Where in a capital case petitioner has been tried twice before for the same crime **without taking** the witness stand, whether it **was error for the trial court** during the third trial to permit the prosecutor at the close of cross-examination of petitioner to ask twice, "This is the first time you have gone on the stand, isn't it, Willie?" where this question did not constitute proper impeachment of petitioner's credibility?

Did the trial court err in permitting cross-examination by the Government of petitioner's expert witness designed to show that the witness had studied under a certain teacher, and that the teacher believed that all persons who commit crimes are insane, where no foundation has been laid?

Did the trial court err in refusing to instruct the jury that it might find petitioner guilty of second degree murder if it found that petitioner did not have a "sound memory and discretion" and to fail to explain these terms to the jury?

V

Statement of the Case.

Petitioner was indicted on April 13, 1953 in the United States District Court for the District of Columbia. The indictment charged the crimes of first degree murder and robbery, arising out of the shooting of one Harry Honikman during a robbery of his store on March 12, 1953 (R. 16).

Petitioner was tried during June, 1953, and found guilty on both counts of the indictment, but judgment was reversed by the United States Court of Appeals for the District of Columbia. *Stewart v. United States*, 94 U.S. App., D.C. 293, 214 F.2d 879 (1954). A second conviction during January, 1955 following remand and a new trial was reversed by the same Court of Appeals, *en banc*. *Stewart v. United States*, 101 U.S. App., D.C. 51, 247 F.2d 42 (1957). A third trial in November, 1958 resulted in a conviction which was affirmed by the Court of Appeals, *en banc*, in a 5-4 decision (R. 380 *et seq.*). The mandatory death penalty has been imposed on petitioner (R. 33, 34).

During the course of the third trial, testimony of witnesses no longer available, was read into the record, first

by the United States (Tr. 12, 52) and later by petitioner, from the transcript of the first two trials. Petitioner did not testify at the first two trials (R. 392). At the third trial, petitioner testified in his own defense (R. 132-140). At the conclusion of the cross-examination of petitioner, he was asked the following questions by the prosecutor (R. 139, 140):

Q. Willie, you were tried on two other occasions.

A. Well, I don't care how many occasions, ~~how~~ many case—you say case. I was a case man once in a time.

Q. This is the first time you have gone on the stand, isn't it, Willie? A. What?

Q. This is the first time you have gone on the stand, isn't it, Willie? A. I am always the stand; I am everything, I done told you.

Mr. Smithson (the prosecutor): That's all.

An immediate motion for a mistrial was denied (R. 141). At the bench, during argument on the motion for a mistrial, the prosecutor gave the following and only attempted justification for this line of questioning (R. 140):

Mr. Smithson: I think that is a fact that the jury is entitled to know, Your Honor. On so many occasions they have referred to the record in the first case or the second case.

At no time did the prosecutor suggest that this questioning was for the purpose of impeachment of the petitioner's credibility.

Petitioner renewed his motion for a mistrial at the close of the evidence (R. 368) and again on a motion for a new trial (R. 32, 33). Both motions were denied (R. 368, 33). By a divided Court, the Court of Appeals affirmed the

conviction on the basis of *Raffel v. United States*, 271 U.S. 494 (1926) (R. 380 *et seq.*).

Dr. E. Y. Williams, a qualified psychiatrist, testified that in his opinion, petitioner was suffering from a mental disease, to wit, manic depressive psychosis, at the time that the crime was committed (R. 153).

Dr. Williams, during cross-examination by the prosecutor, was asked whether he was a follower or studied under one, Dr. Ben Karpman. The witness replied that he had studied under Dr. Karpman, but that he was not a follower of Dr. Karpman's school of psychiatry. Nevertheless, over objection (R. 169), the United States was permitted to ask Dr. Williams:

Q. Do you know, and don't you know as a fact, Doctor Karpman is one of those psychiatrists that subscribes to the view that every time a person commits a crime that that person is suffering under some mental disorder? A. Doctor Karpman has never so expressed that to me in my studies with him.

Q. Tell me, sir, do you subscribe to that view? A. No, sir. I have, each case that I see, I study and come to my own opinion.

Q. But you have testified in this Court, have you not, Doctor? A. Yes, sir.

Q. Have you not so testified that you have never examined a person in a criminal case and found that person of sound mind? A. No, sir; ... (R. 167).

Petitioner was convicted of violation of Title 22, D.C. Code (1951 ed.) sec. 2401, which provides in part:

Whoever, being of sound memory and discretion, kills another . . . in perpetrating or attempting to perpetrate . . . a robbery . . . is guilty of murder in the first degree.

The evidence established, by stipulation, that petitioner's Intelligence Quotient, on the combined Wechsler-Bellevue scale, was 65. Petitioner was discharged from the United States Army in 1945. The discharge report stated that petitioner was within the feeble-minded range and had a mental deficiency (R. 130).

Six witnesses testified as to the irrational behavior indulged in by the petitioner prior to March, 1953. Several of the witnesses testified that petitioner could not remember on the following day the irrational acts which he had committed (R. 45, 67, 68, 75).

Nevertheless, a requested instruction, that the jury might find petitioner guilty of second degree murder if they found that he did not have the requisite "sound memory and discretion" was denied (R. 28, 29). The trial court refused to explain the term "sound memory and discretion" or that this condition was an element of the crime (R. 29). (See Charge to Jury, R. 368, *et seq.*)

VI

ARGUMENT

The Prosecutor Committed Prejudicial Error When Cross-Examining the Defendant by Stating Twice, "This Is the First Time You Have Gone on the Stand, Isn't It, Willie?"

(1)

What Was the Testimony That the Prosecutor Allegedly Sought to Impeach

The legal propriety of the questions propounded by the prosecutor to the defendant, relating to whether or not he had taken the witness stand at previous trials, is largely controlled by the decisions of this Court in *Raffel v. United States*, 271 U.S. 494, 46 S.Ct. 566, 70 L.Ed. 1054 (1926), and *Grunewald v. United States*, 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed. 2d 931 (1957).

In *Raffel*, a prohibition agent testified at the first trial that after searching a drinking place Raffel admitted that the place belonged to him. Raffel did not testify. On a second trial, the agent gave similar testimony. Raffel then took the witness stand, and denied making the statements. *Raffel v. United States*, *supra*, at page 495. Raffel was then asked whether he had taken the stand previously, and following a negative response, why he had not done so. The Court held that if the questions asked of the defendant were logically relevant, and competent within the scope of the rules of cross-examination, then they were not forbidden by any policy in the law of evidence. *Raffel*, *supra*, at page 497.

In *Grunewald v. United States*, *supra*, at pages 419, 420, this Court emphasized the necessity for scrutiny by the

trial court to determine whether an inconsistency which is material and real, exists.

In the instant case, the Court of Appeals held that the direct testimony of the defendant was gibberish without meaning, exhibiting bizarre symptoms and abnormal behavior (R. 380, 381). The prosecutor in his argument to the jury conceded that the defendant's testimony amounted to nothing (Tr. 825, 826). The majority of the Court of Appeals held that the Defendant's testimony constituted only, demeanor evidence (R. 392). Thus the defendant made no material statement of fact, which might permit the prosecutor to interrogate him as to a prior inconsistent statement. The instant case, therefore, is quite different from *Raffel, supra*, where the defendant did make a material statement of fact.

The testimony which the prosecutor allegedly sought to impeach was the demeanor of the Defendant in November, 1958.

(2)

Was There a Real, Material, Inconsistency Between Defendant's Demeanor Evidence of November, 1958 and His Failure to Take the Witness Stand in June, 1953 and/or January, 1955

There are several substantial reasons why there is no real, material, inconsistency between the defendant's demeanor evidence of November, 1958 and his failure to take the witness stand in June, 1953 and/or January, 1955. First, according to the view of the Government and that of a majority of the Court of Appeals, the defendant would have had to take the witness stand in June, 1953 and January, 1955 and testified in a gibberish manner, in order that there be no inconsistency. This is medically unsound. The testimony of the psychiatrists described a manic-de-

pressive psychosis to involve a cycle, where the manifestation of the mental disease would change during that cycle. If the defendant were suffering from such a mental disease, as the defense psychiatrist testified, then he might well have been in the depressive stage of the cycle and could not have exhibited the gibberish which he did in November, 1958. On the other hand, it would be entirely consistent for the defendant to be suffering from a mental disease in November, 1958, and not have been suffering from the same disease at the time of the other trials. Again, it would not be inconsistent for the Defendant to be suffering from one malady in 1958 and a different one, exhibiting different symptoms, during the other trials. The Government's position and that of a majority of the Court of Appeals must of necessity be predicated upon a medical theory that the defendant had the same mental state from June, 1953 through November, 1958. Any deviation from that "same mental state" would destroy their theory of inconsistent behavior. Yet, the law is well acquainted with the proposition that the mental status of individuals can change quite rapidly. The law recognizes that insane persons may have lucid moments when they can validly execute a will or enter a contract. Even the criminal law recognizes that the mental health of an individual may change, by virtue of setting up different tests for criminal responsibility for the commission of a crime, and competency to stand trial.

Second, as the dissenting Judges of the Court of Appeals pointed out, the alleged inconsistency was not between the demeanor of the defendant on the witness stand in November, 1958 and his demeanor on the witness stand at either of the prior trials. It was simply a comparison between his taking the stand at the third trial and not taking it at either of the earlier trials.

Third, this Court in *Grunewald v. United States, supra*, held that the defendant's plea of the Fifth Amendment before the Grand Jury was not necessarily inconsistent with answering at trial the same questions. Although this Court relied on the particular facts involved in the case with respect to that Grand Jury, it is difficult to visualize any situation where it could be held that the response to certain questions was inconsistent with a previous taking of the Fifth Amendment plea to the same questions. This is based on the fact that innocent men can and do take the Fifth Amendment plea. It follows that innocent men may not take the witness stand at trial. They may do this for several reasons. For example, the defendant may have a criminal record for the same type of offense. In the instant case the defendant had a record. To hold otherwise, is to hold that all defendants who do not take the witness stand are *per se* guilty to some extent.

If this Court fails to re-examine *Raffel, supra*, then there is no reason why a prosecutor cannot impeach a defendant who takes the witness stand on the basis that he failed to testify at a hearing before the United States Commissioner or a committing magistrate. No logical distinction can be drawn between the failure to testify at a preliminary hearing and the failure to testify at a trial. In both cases the defendant is under no duty to speak. He has a constitutional and statutory right to remain silent.

A more proper test of inconsistency in similar situations would be did the defendant-witness remain silent when he was under a duty to speak. This would, of course, eliminate situations of failure to testify at preliminary hearings, inquests, and at trials, because in each case there is no duty to speak. Such a rule would also eliminate the need for re-examination of *Raffel, supra*, because *Raffel* recognized that the question must be competent, relevant, and within the proper scope of cross-examination.

(3)

Did the Effect of the Prosecutor's Questions on the Defendant's Credibility Outweigh the Prejudicial Effect

The Court of Appeals held that although the issue of the defendant's sanity at the time of trial was not material, yet, if the defendant's testimony constituted fabrication of evidence, then the Government could properly rebut that evidence. This the Government attempted to do, through the testimony of two expert witnesses who testified that the defendant was malingering, and through the testimony of two lay witnesses. The Government rebutted the defendant's demeanor evidence. There was no need to impeach his credibility further by manifesting to the jury that the defendant in two prior trials had failed to take the witness stand. The prejudicial effect of these statements as contained in the two questions clearly outweighed the benefit of them to the Government's case, see *Grunewald v. United States, supra*, at pages 423, 424.

(4)

The Statements of Fact Contained in the Prosecutor's Questions Were Offered by Him Testimonially and Not for Purposes of Impeachment

The majority of the Court of Appeals held that the questions propounded by the prosecutor were "... prefatory in nature ..." to an attempted impeachment. The majority of the Court recognized that the questions could not be error, only if this were an attack on credibility, and thus within the doctrine of *Raffel, supra*.

Following the propounding of the questions, and the motions for Mistrial by the Defendant, counsel approached the bench. The prosecutor when questioned concerning

what he had done, stated, "I think that is a fact that the Jury is entitled to know, Your Honor" (R. 140). At no time during the conference at the bench or thereafter during the trial did the prosecutor indicate, that the questions propounded to the Defendant on the witness stand with respect to the fact that this was the first time that he had taken the stand, were for impeachment purposes. To the contrary, he specifically stated that he was offering the information to the jury as proof of the fact, that is, testimonially.

Further, the prosecutor made no attempt to complete the impeachment, if it was in fact an attempt at impeachment. The defendant's lack of answers did not foreclose the prosecutor from completing the impeachment by use of extrinsic evidence.

Nor did counsel for the Government dispute in oral argument before the Court of Appeals that the questions propounded by the prosecutor were a parting and final shot given as the prosecutor resumed his seat at the close of the cross-examination.

Based upon these reasons it is respectfully submitted that the questions propounded by the prosecutor were not prefatory in nature to the process of impeachment.

(5)

Decisions of State Courts in Similar Situations

In *People v. Russo*, 295 N.Y.S. 457, 251 App. Div. 176 (1937), the defendant had remained mute before the Magistrates' Court, but testified at trial. The Court inquired of him whether he had testified at the Magistrates' Court, and whether at that time he had made any explanation of why he was running when arrested. Section 393 of the Code of Criminal Procedure (New York) is similar to 18 U.S.C.

Sec. 3481. It removes the common law disability of being a witness, but states that the defendant's neglect or refusal to testify shall not create any presumption against him. The People argued, as in *Raffel v. United States*, *supra*, that by taking the stand at trial, the defendant waived his rights under Section 393 of the Code of Criminal Procedure. The Court held that the inquiry constituted clear error because the defendant had a right to stand mute in the Magistrates' Court.

In *State v. Conway et al.* (Sup. Ct. Mo.), 348 Mo. 587, 154 S.W. 2d 128 (1941) the trial court had permitted the prosecuting attorney to cross-examine one of the defendants with respect to the fact that she had not taken the stand at a preliminary hearing. The Court had occasion to discuss at length the decision in *Raffel v. United States*, *supra*. In holding that the defendants did not waive their rights completely by taking the witness stand at trial, that is, they did not waive the privilege claimed at the preliminary hearing, the Court reasoned as follows. First, the privilege guaranteed by the Constitution is unambiguous, as was the statute which prevented comment thereon. Second, no suspicion or incrimination should follow the assertion of a constitutionally given right. Third, it is just as logical to say that a qualification of the privilege does operate to bring pressure on the accused to testify in the first instance, as it is to contend the opposite. Fourth, this provision of the Constitution should not be interpreted as if it were designed to protect the guilty, nor should it be presumed that one who avails himself of it is hiding his guilt.

Other cases holding it to be prejudicial error to cross-examine a defendant with respect to the fact of whether he took the witness stand at a prior trial, hearing or inquest are, *Loewenherz v. Merchants and Mechanics Bank*

of Columbus, 144 Ga. 556, 87 S.E. 778; *State v. Bailey*, 54 Iowa 414, 6 N.W. 589; *Parrott v. Commonwealth*, 20 Ky. Law Rep. 761, 47 S.W. 452; *People v. Luckman*, 3 N.Y.S. 2d 864; *Smithson v. State*, 127 Tenn. 57, 155 S.W. 133; *Armstrong v. State*, 136 Tex. Cr. 333, 125 S.W. 2d 578.

The Trial Court Erred in Failing to Sustain Objection to and Grant a Mistrial as to Certain Prejudicial Questions Asked of Doctor Williams on Cross-Examination by the Prosecutor.

During the cross-examination of the defense psychiatrist, Doctor Williams, the prosecutor established that the witness had studied under a Doctor Karpman. He then asked the Doctor if it wasn't a fact that Doctor Karpman subscribed to the view that all criminals are suffering from a mental disorder. Despite the witness' protestation that he knew of no such fact, the prosecutor then established that the witness had testified in Court on previous occasions. The prosecutor then asked the witness, "Q. Have you not so testified that you have never examined a person in a criminal case and found that person of sound mind?" The witness replied in the negative (R. 167).

This constituted improper cross-examination, as no foundation was laid. The views of Doctor Karpman were not shown to be authoritative. *Reilly v. Pinkus*, 338 U.S. 269; *Dolcin Corp. v. Federal Trade Commission*, D.C. Cir., 219 F.2d 742, 746, 747; *Abrams v. Gordon*, D.C. Cir., 276 F.2d 500.

Conclusion

Petitioner respectfully submits that the judgment of the Court of Appeals should be reversed and the cause remanded for a new trial.

Respectfully submitted,

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APPENDIX

I

STATUTES INVOLVED

Act of March 3, 1901, 31 Stat. 1321, c. 854; Section 798 as amended, Title 22, Section 2401, of the District of Columbia Code, 1951 edition, provides:

Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do, kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402 of this Code, rape, mayhem, robbery, or kidnapping, or in perpetrating or in attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree.

Act of March 3, 1901, 31 Stat. 1322, c. 854, Section 810, Title 22, Section 2901 of the District of Columbia Code, 1951 edition, provides:

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Act of June 25, 1948, c. 645, 62 Stat. 833, 18 U.S.C. Section 3481 provides:

In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.